



# MEMORANDUM

**DATE:** June 7, 2004

**TO:** Members of the Mayor and Council  
Subcommittee on Downtown and  
Rio Nuevo

**FROM:**   
James Keene  
City Manager

**SUBJECT:** Rialto Theatre

Congress Street Historic Theatres Foundation (CSHTF) and Congress Street Investors (CSI) have submitted a joint application for Rio Nuevo funding. The application proposes that the District purchase the Rialto Theatre and complete a Development Agreement that would create a lease for the restoration, operation and management of the Theatre by the non-profit Foundation (CSHTF).

The application requests funding per the chart below:

Acquisition of real estate	\$1,200,000
Acquisition of concession	340,000
ADA, Life Safety Improvements	100,000
Fundraising match w/in first 6 months	250,000
<b>TOTAL REQUEST</b>	<b>\$1,890,000</b>

The District funding will be matched by the Foundation in 2 ways. The Foundation will make structural, mechanical, plumbing and electrical improvements to the Theatre that will total \$3,362,100. The Foundation will also make lease payments of \$3690 per month for operation of the concession. The first 10 years of lease payments equal \$442,800. The total Foundation match equals \$3,804,900. An additional private investment commitment of \$3,700,000 in the Rialto Block within the next five years has been made by Congress Street Investors.

The benefits to the community include:

- **historic preservation** of a building listed on the National Register of Historic Places
- **cultural development and programming** by a Board of Directors that represent the demographics and diversity of the Tucson community
- **community development** by cultivation of relationships with existing cultural and civic organizations
- **economic development** by dramatically improving the viability of the East Congress business district for new commercial uses.

The Citizens Advisory Committee Subcommittee passed a unanimous motion that the project funding be approved contingent upon the following:

- an appraisal by Argianas and Associates of a minimum of \$1,200,000 for the real estate
- the Board must return to the Citizens Advisory Committee by the first of October for review of the Theatre's Master Plan for renovation, Strategic Programming Plan, and demonstration that the Board and Advisory Board membership truly reflect the diversity of the Tucson community.

The Citizens Advisory Committee approved the above recommendation by a vote of 9 in favor, one abstention, one opposed and one recusion.

It is the recommendation of staff to approve the Subcommittee's and CAC's motion with the condition that the Argianas and Associates appraisal meet a minimum of \$1,200,000 **and** that the appraisal be accepted by the City of Tucson's Appraisal Review Committee.

Attached to this memo, for your review:

- an executive summary of the Development Agreement
- full text of the Development Agreement
- Schedule of Values which is required in paragraph 17 of the Development Agreement

JK:KT:KL

Attachments

## Executive Summary Rialto Theatre Application

The Congress Street Historic Theatres Foundation (CSHTF) and Congress Street Investors, LLC (CSI) have requested a total of \$1,890,000 to purchase and begin capital improvements at the Rialto Theatre. CSI has the Rialto Theatre in escrow, due to close the first week of July, 2004. If funded, CSI will assign the purchase/ownership of the Theatre to the Rio Nuevo District at escrow closing. With approval of the Development Agreement, the District will contract with the Foundation to renovate, operate and manage the Theatre.

There are four components of this funding request:

- 1) The purchase price of the real estate is \$1,200,000 (contingent upon an approved appraisal of at least \$1,200,000).
- 2) The purchase price of the concession (beverages and snacks) is \$340,000. The Foundation will make lease payments on the concession business: \$3690/month or 3% of gross sales (whichever is greater). After the first year, the Foundation will be able to request a rebate of lease payments for additional capital improvements to the Theatre. The request for rebate must be submitted with a schedule of improvements. The rebate will be granted at the discretion of the District and the City Manager's office.
- 3) Immediate improvements for ADA access and bathrooms, correction of life and safety deficiencies and minor cosmetic work will take place this summer. The funding for these improvements is \$100,000.
- 4) The Foundation will be eligible to request an additional \$250,000 in the first 6 months of ownership based on a 1-1 match of its fundraising efforts.

Total match commitment from the Foundation is \$3,804,900 (per the Schedule of Values).

Typically the Theatre is closed during the summer months (it has an evaporative cooling system). The Foundation will utilize this annual hiatus to implement the improvements listed in 3) above. In addition, the Board of Directors will be expanded and an Advisory Board will be created. A Master Plan will be developed for both theatre renovation and programming. Per recommendation by the Rio Nuevo CAC, the Foundation Board must return to the CAC with its Master Plan and a Board that represents the diversity of the Tucson community by October, 2004. The Foundation anticipates having the Theatre re-open in late November or early December, 2004.

Complete renovations are aggressively planned to be completed by December 2006. The Theatre will remain open except for the annual summer hiatus during the renovation period.

It is of utmost importance that the concession be managed by professionals with the experience to operate a business that includes the sale of alcohol. To address this challenge, the Foundation has a preliminary agreement with Nimbus Brewery to manage

the concession business. Nimbus Brewery is a local company with a strong history of supporting the Tucson community. The agreement currently includes the allocation of 50% of the concession profits back to the Foundation for capital improvements and expansion of programming.

It is the intent of the Foundation, under Executive Director Doug Biggers, to substantially expand the programming of the Rialto Theatre. While preserving its current reputation for music that is particularly appealing to young adults, the Foundation has identified opportunities that will serve the Tucson community in a much broader sense. In conjunction with diversifying the music programming, there are opportunities for literary events, theater presentations and family-style entertainment.

An equal benefit is the improved viability of the East Congress Street business district. With the Theatre under community stewardship, the commercial, retail and residential potential of the district can be developed under a more stable environment. CSI is poised to make an additional investment of at least \$3.7 million dollars in the Rialto Block (currently under CSI ownership) and adjacent real estate. The development is consistent with both the Rio Nuevo Master Plan and the Tucson Downtown Alliance vision for East Congress.

The Rialto Theatre application represents a collaboration between private investors, District funding and a community non-profit. It has the potential to catalyze the East Congress area for immediate development consistent with long range plans. It provides a Tucson asset that will serve a larger segment of the population with broader programming goals under new ownership and management.

**INTERGOVERNMENTAL, DEVELOPMENT AND LEASE AGREEMENT  
FOR RESTORATION, OPERATION AND MANAGEMENT OF THE  
HISTORIC RIALTO THEATRE**

THIS AGREEMENT is entered into by and among the City of Tucson (“**City**”), the Río Nuevo Multipurpose Facilities District (“**District**”), Congress Street Investors, L.L.C. (“**CSI**”), and the Congress Street Historic Theatres Foundation (“**Foundation**”). City, District, CSI and Foundation are sometimes collectively referred to in this Agreement as the “**Parties**”.

***RECITALS***

A. City is a municipal corporation of the State of Arizona.

B. District is a multipurpose facilities district established pursuant to Arizona Revised Statutes (A.R.S.) § 48-4201 *et seq.* to revitalize Río Nuevo, the heart of downtown Tucson, financed in part with tax increment financing in accordance with A.R.S. § 42-5031 and § 48-4237.

C. CSI is a domestic limited liability company organized and existing under A.R.S. Title 29, Chapter 4, Article 1.

D. Foundation is an IRS-recognized 501(c)(3) Arizona non-profit organization governed at the time of the execution of this Agreement by a volunteer Board of Directors that includes one (1) representative of District, two (2) of CSI, and three (3) of the community at-large.

E. CSI owns or has contracted to acquire the historic Rialto Theatre located at 318 East Congress Street in downtown Tucson (the “**Historic Rialto Theatre**” or “**Theatre**”), and more particularly described in paragraph 1 below.

F. Both CSI and Foundation desire to restore the Historic Rialto Theatre to approximately its original appearance and function, and have requested District funding to assist in accomplishing this restoration.

G. District and City desire to provide funding and assistance in support of the restoration of the Historic Rialto Theatre.

H. District’s financial participation in the restoration of the Historic Rialto Theatre requires compliance with A.R.S. § 48-4204(B), which provides that facilities funded by a multipurpose facilities district must be owned by the district or publicly owned.

I. When acquired by the District pursuant to this Agreement, the Historic Rialto Theatre will be exempt from property taxes. District ownership will continue the Historic Rialto Theatre’s exemption from property taxes, and Foundation’s non-profit status will cause its leaseback of the Historic Rialto Theatre from District to be exempt from payment of government property lease excise taxes (“GPLET”) prescribed by Arizona Revised Statutes section (A.R.S. §) 42-6201 *et*.

{A0007668.DOC/}

*seq.* However, Foundation's assignment of its interests or exercise of any repurchase option could affect the Historic Rialto Theatre's property tax or GPLET exemption; and Foundation may be responsible for payment of other government impositions, such as the business improvement district ("BID") taxes.

J. This Agreement is intended to be all of the following:

(1) An intergovernmental agreement pursuant to A.R.S. § 11-952 for purposes of the joint exercise of governmental powers by City and District; and

(2) A development agreement between City and Foundation pursuant to A.R.S. § 9-500.05 for purposes of determining development rights and obligations; and

(3) A real estate sales agreement transferring fee simple title to the Historic Rialto Theatre from CSI to District, or an assignment by CSI to the District of CSI's contract to acquire the Historic Rialto Theatre and the District's agreement to close the purchase thereunder; and

(4) A lease of the Historic Rialto Theatre from District to Foundation; and

(5) An operation and management agreement between District and Foundation concerning the use and operation of the Historic Rialto Theatre.

K. District has the authority to acquire and dispose of property and interests in property pursuant to A.R.S. § 48-4203, and District has the authority to enter into intergovernmental agreements under the same statute.

L. The Parties hereby expressly find and determine that the terms of this Agreement are justified based on the other consideration provided under this Agreement, including without limitation the rights and liabilities conferred and imposed on the Parties and the economic development benefits to the community resulting from this Agreement.

#### ***AGREEMENT***

NOW, THEREFORE, BASED ON THE FOREGOING RECITALS, WHICH ARE INCORPORATED HERE AS THE INTENTION OF THE PARTIES IN ENTERING INTO THIS AGREEMENT, and in consideration of the terms of this Agreement, the Parties hereby agree as follows:

1. *Premises.* The property and improvements that are the subject of this Agreement are the premises located at 318 East Congress Street, Tucson, Arizona, more particularly described in **Exhibit 1** attached to this Agreement. The Historic Rialto Theatre consists of the land and all improvements existing or to be constructed on the land described in this paragraph.

2. *Duration of Intergovernmental Agreement.* The portions of this Agreement that constitute an intergovernmental agreement between City and District shall continue until District ceases to exist or until the one year anniversary of the end of the Lease Term (as hereafter defined), whichever occurs first.

3. *Effect of District Dissolution.* If District is dissolved, District's rights and obligations under this Agreement shall automatically transfer to City, and CSI, Foundation and City shall thereafter be "the Parties" for purposes of this Agreement.

4. *Tax Increment Financing.* District hereby agrees to pay One Million Five Hundred and Thirty Thousand Dollars (\$1,530,000.00) out of any tax increment financing received by District pursuant to A.R.S. § 42-5031 and § 48-4237, for actual costs of Historic Rialto Theatre acquisition. District further agrees to pay Foundation not less than One Hundred Thousand Dollars (\$100,000.00) and up to Three Hundred and Fifty Thousand Dollars (\$350,000.00) as further provided in this paragraph:

a. *Payments to CSI:* After District receives (a) an adequate amount of such tax increment funding or (b) proceeds of a sale of bonds secured by such tax increment funding or (c) funding advanced by City for the purposes of funding this Agreement, District shall pay to CSI One Million and Five Hundred and Thirty Thousand Dollars on the later of the effective date of this Agreement (see paragraph \_\_) or the date CSI demonstrates to the satisfaction of District and City both of the following:

(1) that CSI has assigned to the District a contract to acquire the Historic Rialto Theatre and related business assets for One Million Five Hundred and Thirty Thousand Dollars; and

(2) that CSI has caused to be submitted to the Arizona Department of Liquor Licensing and Control the documentation required to transfer the existing liquor license (or a liquor license separately obtained) to Foundation.

b. *Payments To Foundation:* After District receives (a) an adequate amount of such tax increment funding or (b) proceeds of a sale of bonds secured by such tax increment funding or (c) funding advanced by City for the purposes of funding this Agreement, District shall pay to Foundation:

1. One Hundred Thousand Dollars (\$100,000.00) in a single payment upon the occurrence of all of the following:

i. proof that Foundation has completed not less than One Hundred Thousand Dollars (\$100,000.00) of repairs and improvements to the Historic Rialto Theatre to provide for increased public and building safety. In order to effectuate these repairs, CSI shall provide to Foundation One Hundred Thousand Dollars (\$100,000.00), either in cash or with in kind contributions. The improvements contemplated by this subparagraph include, at a minimum:

1. Life Safety and Electrical Improvements – These improvements include added handrails, electrical upgrades, a new steel ladder to the fly loft with OSHA safety equipment, and relocated electric disconnects.
2. Access and Egress Improvements - Enhanced exit signage, improved second floor exiting, ADA compliance for access to bathrooms.
3. Architectural/Engineering/Consulting – A thorough analysis of existing conditions to determine the parameters of a comprehensive renovation and facility upgrade.

ii. proof that Foundation has secured an operator for the Historic Rialto Theatre, and has obtained District's approval of the selected operator. For the purposes of this Agreement, the City Manager or the Manager's designee shall have the authority to approve the operator selected by the Foundation. The Manager or designee shall not unreasonably withhold or delay approval under this section; and

iii.. proof that Foundation has opened the Historic Rialto Theatre to the public for business.

2. An additional Two Hundred and Fifty Thousand Dollars (\$250,000.00) upon proof satisfactory to District that, within six (6) months of the date the Theatre is open to the public for business, Foundation has received matching cash donations, cash receipts, and in-kind donations of materials and labor in a corresponding amount (\$250,000.00) for the Historic Rialto Theatre project.

5. *Procedure for Release of Tax Increment Funding.* Any and all amounts paid by District under paragraph 4 shall be paid into an account established at a national banking institution with District as the named owner. Funds shall be released from the account for payment (a) to lienholders in accordance with paragraph 6, (b) to a person or entity that has provided services or funding for the acquisition or improvement of the Historic Rialto Theatre, or (c) to CSI and/or Foundation, in accordance with paragraph 4, for reimbursement of payments for the acquisition or improvement of the Historic Rialto Theatre, based on evidence satisfactory to the District. No payments shall be made from the account without the authorization of a District or City employee designated by District for that purpose.

6. *Transfer of Title to District.* Transfer of title to the Historic Rialto Theatre shall be accomplished by CSI's assignment to District of CSI's contract to acquire the Historic Rialto Theatre, and District's agreement to close the purchase thereunder. Ownership of the Historic Rialto Theatre shall be transferred to District by special warranty deed, free and clear of all liens and encumbrances except those title matters set forth on Exhibit 1. Title shall be transferred concurrently with (a) the establishment of the account referenced in paragraph 5, (b) the funding of that account with One Million and Five Hundred and Thirty Thousand Dollars in accordance with paragraph 4.a, and (c) the release of such funding from that account to pay off preexisting liens for CSI's acquisition of the Historic Rialto Theatre. On the date of acquisition of the Historic Rialto Theatre, District and CSI shall cause to be executed and recorded mutually satisfactory instruments to terminate, modify and/or establish covenants and easements concerning the Historic Rialto Theatre and adjacent property owned by CSI or its affiliates.

7. *Leaseback to Rialto.* District hereby leases the Historic Rialto Theatre to Foundation or to an entity which is owned and controlled by Foundation for a period of fifty (50) years beginning on the day that District acquires title to the Historic Rialto Theatre to District by special warranty deed as provided in paragraph 6 (referred to in this Agreement as the "**Lease Commencement**"). The 50-year period of time from Lease Commencement to the end of the lease is referred to in this Agreement as the "**Lease Term**".



8. *Rent*. This is what is commonly referred to as a “triple-net” lease, in which Foundation shall make the following payments, all of which shall be collectively referred to in this Agreement as “**Rent**”:

a. Base rent, payable to District, as follows:

i. *First Ten Years of Lease Term*. For the first ten (10) years of the Lease Term the base rent shall be \$3,690.00 per month. The initial payment of Base rent is due and payable on the date that Foundation opens the Theatre for business to the public, or on January 3, 2005, whichever is earlier; thereafter, payments are due and payable on the first day of each month and will be considered late if not paid (postmarked or received).

ii. *Remainder of Lease Term*. For the remainder of the Lease Term, the base monthly rent shall be the greater of: 1) \$3,690.00 or 2) an amount equal to three percent (3%) of Foundation’s gross receipts generated from the operation of the Historic Rialto Theatre, inclusive of all revenue generating activities of the Theatre (e.g. ticket sales, merchandise sales, food and beverage sales, etc.). For the purpose of determining this amount, Foundation shall keep and maintain complete and accurate records of its gross receipts, and shall make the same available to District or City upon request.

b. Any and all property taxes or payments in lieu of taxes including any possessory interest taxes (for example, GPLET) required or contributed to as a result of the lease entered into by this Agreement.

c. All taxes, fees and other monies payable for or in connection with the Historic Rialto Theatre including without limitation the following (which are collectively referred to in this Agreement as “Impositions”) at least fifteen days before the last day when payment may be made without penalty or interest and before the nonpayment constitutes a default under the provisions of any mortgage:

i. All taxes, assessments, water rents, rates and charges, sewer rents, license and permit fees and all other governmental impositions and charges of every kind and nature whatsoever, general and special, ordinary and extraordinary, foreseen and unforeseen, of any kind or nature whatsoever, and each and every installment thereof, which shall be charged, laid, levied, assessed, imposed, become due and payable or arise,

ii. All taxes charged, laid, levied, assessed or imposed in lieu of or in addition to the foregoing under or by virtue of all present or future laws, ordinances, requirements, orders, directions, rules or regulations of the federal, state, county and municipal governments and of all other governmental authorities whatsoever, and

iii. All fees and charges of public and governmental authorities for construction, maintenance, occupation or use, of any sidewalk, street or other publicly owned property adjacent to the Historic Rialto Theatre in connection with the use, occupancy or possession of the Historic Rialto Theatre, including without limitation any encroachment or use for signage, marquee, ticket booths and other uses and activities.

9. *Conversion of Special Assessments*. To the extent permitted by law and by any mortgage, Foundation shall have the right to apply for the conversion of any special assessment for local improvements to cause the same to be payable in installments, and upon such conversion

Foundation shall be obligated to pay and discharge punctually only such of said installments (with interest and charges thereon) as shall become due and payable during the term of this Agreement, but such assessments may not be payable over a period longer than ten years.

10. *Evidence of Foundation Payment.* Upon District or City's request, Foundation shall promptly furnish District or City satisfactory evidence that any payment required under paragraph 8 has been timely made.

11. *Deposit of Impositions.* Unless Foundation makes advance monthly deposits of property taxes and other Impositions with a mortgagee, District or City may require Foundation on the first day of each month to deposit with City an amount equal to each of the Impositions next becoming due (based on the most recent available billing information), less all sums already deposited (plus interest earned thereon not theretofore paid out), divided by the number of months until the month preceding the date upon which each such Imposition is due and payable, which deposits shall be held in escrow in an interest-bearing account by District or City and, to the extent so held, shall be applied to the payment of each Imposition for which made. Any default by Foundation in making any such deposit shall be treated as default in the payment of Rent.

12. *District's Optional Termination of Lease and Agreement.* After District acquires title to the Historic Rialto Theatre, District may at its option terminate the lease and this Agreement by executing a special warranty deed, conveying the Historic Rialto Theatre, free and clear of all liens and encumbrances except those title matters set forth on Exhibit 1 and any additional matters authorized by agreement of the Parties, to Foundation or to an entity owned and controlled by Foundation. If District chooses to terminate the Agreement pursuant to this paragraph, Foundation shall have no further obligations in consideration for the tax increment funding provided under this Agreement (see paragraph 4).

13. *Foundation's Repurchase Option.* From the tenth anniversary of Lease Commencement to the termination of this Agreement (see paragraph ), Foundation may at its option repurchase the Historic Rialto Theatre from District by paying an amount equal to the total tax increment funding provided by District to all Parties pursuant to paragraph 4 divided by four hundred eighty (480) and multiplied by the number of months remaining in the Lease Term plus ten dollars provided, however, that this repurchase option shall not be available while Foundation is in default under this Agreement (see paragraph ). This Agreement shall terminate upon the closing of Foundation's purchase pursuant to its exercise of the repurchase option.

14. *Operation and Management of the Historic Rialto Theatre.* The Historic Rialto Theatre shall be operated and managed in accordance with the terms, conditions, limitations and requirements set forth in this Agreement.

15. *Use and Operation of Historic Rialto Theatre.* The Historic Rialto Theatre shall be used solely for the restoration, operation, management and maintenance of the Historic Rialto Theatre facility. The Historic Rialto Theatre shall be operated in a manner generally consistent with other commercial movie and stage theaters in the City, and all activities and events shall be open to the public without discrimination (see paragraph \_\_\_\_); provided, however, that nothing in this paragraph shall prevent the Historic Rialto Theatre from being offered and made available to the public without discrimination for private gatherings and parties. During the Lease Term (see

paragraph 7), Foundation shall keep the Historic Rialto Theatre in operation with events open to the general public, except during temporary closures to accommodate reasonable renovations and repairs. Foundation shall not use or occupy, nor permit or suffer, the Historic Rialto Theatre or any part thereof to be used or occupied for any unlawful or illegal business, use or purpose, nor for any hazardous business use or purpose, nor in such a manner as to constitute a nuisance of any kind, nor for any purpose or in any way in violation of any present or future governmental laws, ordinances, requirement, orders, directions, rules or regulations. Foundation shall immediately upon the discovery of any such unlawful, illegal or hazardous use take all necessary steps, legal and equitable, to compel the discontinuance of such use and to oust and remove any subtenants, occupants or other persons of such unlawful, illegal or hazardous use. Foundation shall at all times operate and manage the Historic Rialto Theatre in compliance with all applicable laws and regulations pertaining to the sale of alcoholic beverages and spirituous liquor, including Title 4 of the Arizona Revised Statutes and all regulations lawfully promulgated thereunder and Chapter 11 of the Tucson Code. In the event that Foundation replaces the person(s) selected pursuant to paragraph 4(b)(1)(ii) to operate the liquor sales for the Theatre, Foundation shall notify both City and District within thirty (30) days of the name and qualifications of the new operator for concurrence, which concurrence shall not be unreasonably withheld or delayed.

16. *Programming.* The quality and nature of programming and the subject matter of any concert, musical performance, movie, show, display or activity at the Historic Rialto Theatre shall not give rise to or constitute a default under this Agreement unless the concert, musical performance, movie, show, display or activity constitutes a public nuisance or a violation of laws or ordinances of general application within the Tucson city limits.

17. *Restoration Plans and Schedule of Values.* Foundation shall present the plans and schedule of values for the Historic Rialto Theatre restoration to District and City for concurrence. The schedule of values shall provide a breakdown of the anticipated or actual cost of each item of construction, which shall be used to determine the payments to be made in accordance with paragraphs 4(b)(i) and 5 of this Agreement.

18. *Requirements and Standards for Restoration of the Historic Rialto Theatre.*

a. *Minimum restoration requirements.* In addition to the restoration requirements recited in paragraph 4, Foundation shall, for the first ten (10) years of the Lease Term (i.e. from Lease Commencement through the tenth (10<sup>th</sup>) anniversary of Lease Commencement), expend not less than three percent (3%) of Rialto's gross receipts generated from the operation of the Historic Rialto Theatre, inclusive of all revenue generating activities of the Theatre (e.g. ticket sales, merchandise sales, food and beverage sales, etc.) upon restoration of the Theatre. For the purpose of determining this amount, Foundation shall keep and maintain complete and accurate records of its gross receipts, and shall make the same available to District or City upon request. Restoration shall include, at a minimum, the improvements described in paragraph 4(b)(1)(i), as well as the following:

i. Aesthetic Improvements – Extensive cleaning and sanitizing, plaster repair, painting.

ii. Acoustic and Performance Improvements – Treatments to enhance sound quality, including the addition of sound deadening fabric on walls and the creation of ceiling bass traps; improved patron seating.

iii. Marquee Improvements – Construction and installation of a new theatre marquee.b. *Minimum restoration standards.* The Historic Rialto Theatre shall be restored in accordance with all of the following:

i. Standards for historic preservation promulgated by the Secretary of the Interior of the United States.

ii. Standards for construction of public buildings adopted by City and implemented by the City Facilities Management department.

iii. All applicable provisions of the City Code.

iv. All applicable provisions of the Americans with Disabilities Act (ADA), 42 U.S.C. §§12101 et seq.

c. Before construction of the Historic Rialto Theatre restoration or any other construction on the premises of the Historic Rialto Theatre, Foundation shall submit construction plans and specifications to District and City for written concurrence, which shall be given at the reasonable discretion of District and City, which concurrence shall not be unreasonably withheld or delayed.

d. Before construction begins, Foundation shall present to District and City for concurrence the name of the contractor selected for the work, which concurrence shall not be unreasonably withheld or delayed.

e. Foundation shall use and employ only licensed, bonded and qualified contractors.

f. All improvements shall be constructed in a good, workmanlike and first-class manner, and constructed and maintained in compliance with all applicable laws, rules, ordinances and regulations.

19. *Regulatory Compliance and Approvals.* Foundation shall, at its expense, comply with all existing and future federal, state, county and municipal laws, ordinances, rules and regulations in connection with the use, operation, maintenance and restoration of the Historic Rialto Theatre. Foundation shall obtain all necessary government approvals, permits or licenses that are necessary to Foundation's restoration, construction, operation, use or improvement of the Historic Rialto Theatre. If any certificate, permit, license or approval issued to Foundation is cancelled, expires, lapses or is otherwise withdrawn or terminated by any governmental authority, Foundation shall make every effort to effect necessary remedies to the satisfaction of City and District. Failure to do so shall constitute default under this Agreement.

20. *City Code Compliance.* Construction of all improvements on the premises of the Historic Rialto Theatre shall conform to the requirements of the City Code. This provision shall not preclude or limit Foundation's right to seek text amendments, rezoning, or variances as may be permissible under and in accordance with the City Code and Arizona law. This Agreement shall not in any way limit or preclude City or any of its boards, commissions, agencies or officers

from exercising such discretion as it or they may have with respect to any such relief requested by Foundation.

21. *Payment and Performance Bonds.* Before Foundation begins construction of the Historic Rialto Theatre restoration or any other improvements on the premises of the Historic Rialto Theatre, payment and performance bonds conforming with A.R.S. § 34-222 shall be obtained, assuring that the improvements will be constructed in accordance with the approved plans and that all contractors and subcontractors will be timely paid.

22. *Mechanics' and Materialmens' Liens.* No mechanics and materialmens' liens shall be recorded against the Historic Rialto Theatre, and Foundation shall promptly and diligently take whatever action is necessary to ensure that no such lien is recorded, and if it is, to remove any such lien.

23. *Statutory Compliance for Construction.* Construction of all improvements on the premises of the Historic Rialto Theatre which are funded all or in part with public funds, including the funds provided in accordance with paragraph 4, shall be accomplished in conformance with the requirements of A.R.S. Title 34 and A.R.S. § 48-4204(C). These provisions generally require publicly funded construction projects to be put out to bid and awarded to the lowest qualified bidder.

24. *Restoration Schedule.* Restoration of the Historic Rialto Theatre shall be substantially complete not later than \_\_\_\_\_, 20\_\_\_\_. For purposes of this paragraph, the Historic Rialto Theatre restoration shall be deemed to be substantially complete when all of the improvements described in paragraphs 4(b)(1)(i) and 18 are completed.

25. *Ownership of Improvements.* All improvements constructed or to be constructed on the premises of the Historic Rialto Theatre shall be and remain owned by District, subject to Foundation's Lease (see paragraph 7) and repurchase option (see paragraph ).

26. *Ownership of Liquor License.* Neither the District nor the City obtains or acquires any ownership interest in the liquor license issued for the premises by virtue of this Agreement.

27. *No District or City Expenditures.* Neither District nor City shall be required to make any repairs or improvements to the Historic Rialto Theatre in connection with this Agreement.

28. *Signs.* Foundation may place signs on the Historic Rialto Theatre in conformance with applicable government regulations, with District and City's prior written consent to design, size and location, which shall not be unreasonably withheld. City's consent shall not waive any applicable provision of the City Sign Code, or the terms or conditions of any applicable variance. City acknowledges that variances previously have been granted concerning the erection of the Rialto Theatre sign and marquee, and that permits for the same have been issued in accordance with those variances. Foundation shall timely construct and erect the sign and marquee in a manner consistent with the terms and conditions of the variances and permits that have been issued, subject to changes approved by District and City as provided in this paragraph.

29. *Graffiti.* Foundation shall be solely responsible for graffiti abatement on the Historic Rialto Theatre. Should Foundation fail to perform graffiti abatement within five days of notification that graffiti exists on the Historic Rialto Theatre, District or City at any time

{A0007668.DOC/}

HISTORIC RIALTO THEATRE RESTORATION AGREEMENT

05/22/04 DRAFT

RIO NUEVO MULTIPURPOSE FACILITIES DISTRICT

PAGE 9 OF 2323 |

thereafter may abate or remove the graffiti from the Historic Rialto Theatre. Foundation shall reimburse all reasonable costs incurred by District or City in connection with such abatement or removal. Reimbursement shall be made within thirty days after District or City presents Foundation with a statement of such costs.

30. *Maintenance.*

a. Foundation shall at its own cost and expense put, keep, replace, and maintain in meticulous repair and in good, safe and substantial order and clean and first class condition (taking into consideration the age and initial condition as of the date of acquisition by the District), all improvements on the Historic Rialto Theatre or forming a part thereof, and their full equipment and appurtenances, both inside and outside, structural and nonstructural, extraordinary and ordinary, foreseen or unforeseen, no matter how the need or desirability for repairs may occur, and whether or not made necessary by wear, tear or defects, latent or otherwise; and shall use all reasonable precautions to prevent, and shall promptly repair or restore, any waste, damage or injury. Foundation shall also at its own cost and expense put, keep, replace and maintain in meticulous repair and in good, safe and substantial order and condition, and free from dirt, mud, ice, rubbish and any and all other obstructions or encumbrances, the sidewalks, areas and curbs in front of and adjacent to the Historic Rialto Theatre.

b. Foundation expressly waives the right to make repairs at District's expense, and agrees that District shall not be required to furnish or provide to Foundation any facilities or services of any kind whatsoever during the term of this Agreement, such as, but not limited to, water, steam, heat, air conditioning, gas, hot water, electricity, light and power, or to make any repairs, replacements, renewals or restorations of any kind. However, District agrees to cooperate, without cost to it, to enable Foundation to obtain such services to the Historic Rialto Theatre.

31. *Access.* District and City and their agents shall have the right upon twenty-four hours notice to enter the Historic Rialto Theatre at reasonable times to examine and inspect the Historic Rialto Theatre. Foundation reserves the right to accompany District or City and their agents during such examination and inspection. In case of emergency, District or City may immediately access the Historic Rialto Theatre, provided that District or City shall notify Foundation of such emergency access as soon as is reasonably practicable.

32. *Utilities.* Foundation shall be responsible for obtaining any utility service needed for the Historic Rialto Theatre and shall pay when due all charges for utilities to the Historic Rialto Theatre.

33. *Improvement of Other Properties in the District.* In consideration for District's payment of the TIF funds described in paragraphs 4 and 5, CSI agrees that it (or it and its subsidiaries and affiliates) will invest and expend funds or assets (in addition to those identified in this agreement for the restoration of the Historic Rialto Theatre, and not including any Back to Basics or any other City-originated funds) of not less than Three Million and Sixty Thousand Dollars (\$3,060,000.00) before the fifth anniversary of Lease Commencement for the acquisition and/or improvement of other properties located within the boundaries of the Rio Nuevo Multipurpose Facilities District, which properties may include (but are not limited to):

{A0007668.DOC/}

- a. the 300 block of East Congress;
- b. 201 E. Broadway;
- c. 256 through 278 E. Congress.

The improvements shall include, but need not be limited to, building safety and public safety improvements, façade restoration and improvement, creation or rehabilitation of retail space, and streetscape improvements. CSI shall keep and maintain records sufficient to document satisfaction of this obligation, and shall make the same available to District or City upon request.

34. *Foundation Default.* Foundation shall be in default under this Agreement if it:

- a. fails to pay Rent, including payment of any financial obligation (including Impositions), when due; or
- b. fails to satisfy the restoration schedule as required in paragraph \_\_\_ or elsewhere in this Agreement; or
- c. fails to perform any other material covenant or condition of this Agreement; or
- d. abandons or vacates the Historic Rialto Theatre; or
- e. is adjudicated a bankrupt entity or makes any assignment for the benefit of creditors.

35. *CSI Default.* CSI shall be in default under this Agreement if it:

- a. fails to assign its contract to acquire the Historic Rialto Theatre in the manner as described in paragraph 6 ;
- b. fails to cause the transfer, in a timely manner, to Foundation of the liquor license issued for the premises, unless the failure is caused by non-performance of a third party;
- c. fails to provide Foundation with the payments described in paragraph 4(b)(1)(i) to cause the building safety improvements described therein;
- d. fails to perform any other material covenant or condition of this Agreement, including the investment of funds as described in paragraph 33; or
- e. is adjudicated a bankrupt entity or makes any assignment for the benefit of creditors

36. *Procedure and Remedies upon Foundation or CSI Default.* In the event of either Foundation's or CSI's material breach of its obligations under this Agreement, District shall give the defaulting party sixty days written notice of default, identifying the facts and circumstances constituting default and providing a reasonable time, not less than sixty days after the date of the notice, for the defaulting party to begin to cure the default. The party in default shall thereafter diligently pursue the cure to completion. If for any reason the party in default fails to cure its default as required by this paragraph, and if the default occurs subsequent to Lease Commencement, District shall be entitled, at its option, in addition to and not exclusive of any other remedy District may have by operation of law, to enter the Historic Rialto Theatre and eject Foundation therefrom, and declare Foundation's rights under this Agreement at an end. Foundation shall pay all sums owing under this Agreement for the use and operation of the Historic Rialto Theatre through the date of termination.

{A0007668.DOC/}

37. *Ownership Upon Taking Possession.* Any and all personal property, equipment or other improvements on the premises of the Historic Rialto Theatre which are not removed within sixty days after District takes possession of the Historic Rialto Theatre as a result of a default by CSI or Foundation shall become the property of District, at District's option, or shall be removed by District and the cost of removal shall be charged to Foundation.

38. *Forebearance.* Notwithstanding paragraphs 36 and 37, from the Lease Commencement to the first anniversary of the Lease Commencement, neither District nor City shall seek to terminate Foundation's Lease unless Foundation abandons or vacates the Historic Rialto Theatre premises or permits or threatens to permit an action that could result in the demolition or destruction of all or a substantial portion of the Historic Rialto Theatre premises.

39. *Cure by District.* If CSI or Foundation defaults under this Agreement, District may, after prior written notice, cure the default for the account of and at the reasonable expense of the defaulting party. . If District is compelled to pay or elects to pay any sum of money or to do any act which will require the payment of any sum of money or is compelled to incur any expense, including reasonable attorney fees in instituting, prosecuting or defending any action to enforce District's rights under this Agreement, the sums so paid by District, with all interest, costs and damages shall be deemed to be additional Rent (see paragraph 8) which shall be due from Foundation to District on the first day of the month following the incurring of the respective expenses.

40. *Damage or Destruction.* If the Historic Rialto Theatre or any portion of it is destroyed or damaged through no fault or negligence of Foundation in a way that materially hinders its effective use, Foundation shall make necessary repairs within a reasonable period of time. Neither District nor City shall have any obligation to repair any damage to any portion of the Historic Rialto Theatre.

41. *Effect of Condemnation.* If the Historic Rialto Theatre is taken by eminent domain, this Agreement shall terminate when title to the Historic Rialto Theatre vests in the condemning authority or when the condemning authority takes physical possession of the Historic Rialto Theatre, whichever occurs first. If a portion of the Historic Rialto Theatre is taken by eminent domain so that the operation of the Historic Rialto Theatre is materially hindered, District and Foundation shall have the right to terminate this Agreement by giving thirty days' written notice to the other Parties. The right to terminate vests when title to the Historic Rialto Theatre vests in the condemning authority or when the condemning authority takes physical possession of the Historic Rialto Theatre, whichever occurs first. This Agreement shall continue unabated if a partial taking of the Historic Rialto Theatre by eminent domain leaves the Historic Rialto Theatre reasonably able to be used in a manner consistent with paragraph 15, except for equitable abatement of Rent on account of the partial taking.

42. *Proceeds in Condemnation.* All proceeds and damages awarded in any condemnation action or in any acquisition under threat of condemnation, whether awarded as compensation for diminution in value of the leasehold or to the fee of the Historic Rialto Theatre, shall be paid as follows:

- a. If the condemnation is a total taking, the proceeds and damages shall go first to District in an amount equal to District's total contribution of TIF funds to all parties as



described in paragraphs 4 and 5, and second to Foundation to the extent the condemnation proceeds exceed the amount paid to District.

b. If the condemnation is a partial taking and does not prevent the continued operation by Foundation of the Historic Rialto Theatre, the proceeds shall go first to Foundation to compensate for the damages incurred to Foundation's business and the diminished value of its leasehold and loss of its repurchase option, and second to District to the extent the condemnation proceeds exceed the amount of Foundation's damages.

c. Nothing in this paragraph shall affect Foundation's right to claim and recover payments under federal or state uniform relocation acts or, if recoverable, for damage to Foundation's business.

#### *43. Indemnity and Insurance.*

a. Disclaimer of Liability. Neither District nor City shall at any time be liable for injury or damage occurring to any person or property from any cause whatsoever arising out of Foundation's construction, maintenance, repair, use, management, operation, condition or dismantling of the Historic Rialto Theatre.

b. Indemnification. Foundation shall, at its sole cost and expense, indemnify, defend and hold harmless City, District, the City of South Tucson, and the officers, employees, boards, commissions, agents, attorneys, and contractors of the foregoing entities (hereinafter referred to as "Indemnitees"), from and against:

i. Any and all liability, obligation, damages, penalties, claims, liens, costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and consultants), which may be imposed upon, incurred by or be asserted against the Indemnitees by reason of any act or omission of Foundation, its personnel, employees, agents, contractors or subcontractors, resulting in personal injury, bodily injury, sickness, disease or death to any person or damage to, loss of or destruction of tangible or intangible property, libel, slander, invasion of privacy and unauthorized use of any trademark, trade name, copyright, patent, service mark or any other right of any person, firm or corporation, which may arise out of or be in any way connected with the construction, installation, operation, maintenance, use or condition of the Historic Rialto Theatre or Foundation's failure to comply with any federal, state or local statute, ordinance or regulation.

ii. Any and all liabilities, obligations, damages, penalties, claims, liens, costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and other consultants), which are imposed upon, incurred by or asserted against the Indemnitees by reason of any claim or lien arising out of work, labor, materials or supplies provided or supplied to Foundation, its contractors or subcontractors, for the installation, construction, operation, maintenance or use of the Historic Rialto Theatre and, upon the written request of District or City, Foundation shall cause such claim or lien covering the Historic Rialto Theatre property to be discharged or bonded within thirty (30) days following such request.

iii. Any and all liability, obligation, damages, penalties, claims, liens, costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and consultants), which may be imposed upon, incurred by or be asserted against the Indemnitees by reason of any financing or securities offering by Rialto or its affiliates for violations of the common law or any laws, statutes, or regulations of the State of Arizona or United States, including those of the Federal Securities and Exchange Commission, whether by Foundation or otherwise.

iv. Any and all liability, obligation, damages, penalties, claims, liens, costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and consultants), which may be imposed upon, incurred by or be asserted against the Indemnitees for relocation benefits for the business currently operated at the Historic Rialto Theatre facility (except to the extent such business is transferred to District and/or the Foundation in connection with the acquisition of the facility).

c. Assumption of Risk. Foundation undertakes and assumes for its officers, agents, affiliates, contractors and subcontractors and employees (collectively "Foundation" for the purpose of this section), all risk of dangerous conditions, if any, on or about the Historic Rialto Theatre, and Foundation hereby agrees to indemnify and hold harmless the Indemnitees against and from any claim asserted or liability imposed upon the Indemnitees for personal injury or property damage to any person (other than from Indemnitees' gross negligence) arising out of Foundation's installation, operation, maintenance, condition or use of the Historic Rialto Theatre or Foundation's failure to comply with any federal, state or local statute, ordinance or regulation.

d. Defense of Indemnitees. In the event any action or proceeding shall be brought against the Indemnitees by reason of any matter for which the Indemnitees are indemnified hereunder, Foundation shall, upon notice from any of the Indemnitees, at Foundation's sole cost and expense, resist and defend the same with legal counsel mutually selected by Foundation, District and City; provided however, that Foundation shall not admit liability in any such matter on behalf of the Indemnitees without the written consent of District and City and provided further that Indemnitees shall not admit liability for, nor enter into any compromise or settlement of, any claim for which they are indemnified hereunder, without the prior written consent of Foundation.

e. Notice, Cooperation and Expenses. District or City shall give Foundation prompt notice of the making of any claim or the commencement of any action, suit or other proceeding covered by the provisions of this paragraph. Nothing herein shall be deemed to prevent District and City from cooperating with Foundation and participating in the defense of any litigation by District or City's own counsel. Foundation shall pay all reasonable out-of-pocket expenses incurred by District or City in response to any such actions, suits or proceedings, including attorney fees and the reasonable value of services rendered by District's and City's attorneys, and the actual out-of-pocket expenses of District's and City's agents, employees and witnesses. These expenses shall not include attorneys fees for services that are unnecessarily duplicative of services provided by Foundation. If Foundation requests District or City to assist it in such defense then Foundation shall pay all expenses

incurred by District and City in response thereto, including District and City defending themselves with regard to any such actions, suits or proceedings. These expenses shall include all out-of-pocket expenses such as attorney fees and shall also include the costs of any services rendered by District's and City's attorneys, and the actual expenses of District's and City's agents, employees or expert witnesses, and disbursements and liabilities assumed by District or City in connection with such suits, actions or proceedings.

f. Insurance. Foundation shall maintain, or cause to be maintained, in full force and effect and at its sole cost and expense, the following types and limits of insurance:

i. Worker's compensation insurance meeting applicable statutory requirements and employer's liability insurance with minimum limits of One Hundred Thousand Dollars for each accident.

ii. Comprehensive commercial general liability insurance with minimum limits of Three Million Dollars as the combined single limit for each occurrence of bodily injury, personal injury and property damage. The policy shall provide blanket contractual liability insurance for all written contracts, and shall include coverage for products and completed operations liability, independent contractor's liability; coverage for property damage from perils of explosion, collapse or damage to underground utilities, commonly known as XCU coverage.

iii. Automobile liability insurance covering all owned, hired, and non-owned vehicles in use by Rialto, its employees and agents, to comply with the provisions of state law with minimum limits of One Million Dollars as the combined single limit for each occurrence for bodily injury and property damage.

iv. At the start of and during the period of any Foundation construction, builders all-risk insurance, together with an installation floater or equivalent property coverage covering cables, materials, machinery and supplies of any nature whatsoever which are to be used in or incidental to the construction of the Improvements. Upon completion of the Improvements, Foundation shall substitute for the foregoing insurance policies of fire, extended coverage and vandalism and malicious mischief insurance on the Historic Rialto Theatre. The amount of insurance at all times shall be representative of the insurable values installed or constructed.

v. Business interruption insurance coverage in an amount sufficient to cover such loss of revenues, for the period of time which it would take, under normal circumstances, to repair or replace that part(s) of the Historic Rialto Theatre which is damaged and caused the loss of revenue.

vi. All policies shall be written on an occurrence and not on a claims made basis.

vii. The coverage amounts set forth above may be met by a combination of underlying and umbrella policies so long as in combination the limits equal or exceed those stated.

g. Additional Insureds. All policies, except for business interruption, worker's compensation and all risk property, shall include City, District, the City of South Tucson, and the officers, employees, boards, commissions, agents, attorneys, and contractors of the

foregoing entities, as their respective interests may appear, as additional insureds (herein referred to as the "Additional Insureds"). Each policy which is to be endorsed to add Additional Insureds hereunder, shall contain the following cross-liability wording if reasonably available from the insurer at no material additional expense: "In the event of a claim being made hereunder by one insured for which another insured is or may be liable, then this policy shall cover such insured against whom a claim is or may be made in the same manner as if separate policies had been issued to each insured hereunder." However, this condition does not operate to increase the insurance company's limit of liability.

h. Evidence of Insurance. Certificates of insurance for each insurance policy required to be obtained by Foundation in compliance with this paragraph, along with written evidence of payment of required premiums shall be filed and maintained with District and City annually. Foundation shall immediately advise District and City of any claim or litigation that may result in liability to District or City.

i. Cancellation of Policies of Insurance. All insurance policies maintained pursuant to this Agreement shall contain the following endorsement: "At least sixty days [or such shorter period as is reasonably available from the insurer] prior written notice by registered mail shall be given to District and City by the insurer of any intention not to renew such policy or to cancel, replace or materially alter same."

j. Insurance Companies. All insurance shall be effected under valid and enforceable policies, insured by insurers licensed to do business by the State of Arizona or surplus line carriers on the State of Arizona Department of Insurance approved list of companies qualified to do business in the State of Arizona. All insurance carriers and surplus line carriers shall be rated A or better by A.M. Best Company.

k. Deductibles/Self Insurance or Retentions. All insurance policies may be written with deductibles not to exceed Five Hundred Thousand Dollars, unless a different amount is approved in advance by District and City, as long as Foundation retains in a separate account an amount sufficient to cover the cumulative amount of all such deductibles and provides District and City with written confirmation of the financial institution, account number and amount of the account where the funds are held. Foundation shall indemnify and hold harmless District, City, the Indemnitees and Additional Insureds from and against the payment of any deductible and from the payment of any premium on any Foundation insurance policy required to be furnished by this Agreement.

l. Contractors. Foundation shall require each and every one of its contractors and their subcontractors who perform work on the Historic Rialto Theatre to carry, in full force and effect, workers' compensation, comprehensive public liability and automobile liability insurance coverages of the type which Foundation is required to obtain under the terms of this paragraph with appropriate limits of insurance.

m. Review of Limits. Once during each calendar year, District and City may review the insurance coverages to be carried by Foundation. If District or City determines that higher limits of coverage are reasonably necessary to protect the interests of District and City or the Additional Insureds, Foundation shall be so notified and shall obtain the additional limits of insurance, at its sole cost and expense; provided, however, that any such increase in

coverages shall not increase Foundation's cost of coverage in any year by more than five percent over the previous year's cost.

44. *Hazardous Substance Indemnification.* Foundation represents and warrants that its use of the Historic Rialto Theatre herein will not generate any hazardous substance, and Foundation will not store or dispose on the Historic Rialto Theatre nor transport to or over the Historic Rialto Theatre any hazardous substance not required for the proper operation of the facility. Foundation further agrees to hold District and City harmless from and indemnify District and City against any release of any hazardous substance by Foundation or its contractors and any damage, loss, or expense or liability resulting from such release including all attorneys' fees, costs and penalties incurred as a result thereof except any release caused by the sole negligence of District or City, its employees or agents. "Hazardous substance" shall be interpreted broadly to mean any substance or material defined or designated as hazardous or toxic waste, hazardous or toxic material, hazardous or toxic or radioactive substance, or other similar term by any federal, state or local environmental law, regulation or rule presently in effect or promulgated in the future, as such laws, regulations or rules may be amended from time to time; and it shall be interpreted to include, but not be limited to, any substance which after release into the environment will or may reasonably be anticipated to cause sickness, death or disease.

45. *Mortgage or Security Interest.* The Historic Rialto Theatre shall not be pledged as security in any deed of trust or mortgage or other document creating a security interest without the prior written consent of Foundation, District and City, which shall not unreasonably be withheld or delayed so long as the proceeds of the loan secured by the pledge are used for restoration or operation of the Historic Rialto Theatre.

46. *Acceptance of Historic Rialto Theatre.* Neither District nor City makes any representation or warranty with respect to the condition of the Historic Rialto Theatre and neither District nor City shall be liable for any latent or patent defect in the Historic Rialto Theatre.

47. *Estoppel Certificate.* District shall, at any time and from time to time upon not less than ten days prior request by Foundation, deliver to Foundation a statement in writing certifying (or if the circumstances are otherwise, than so reciting) that (a) the leasehold interest created by this Agreement is unmodified and in full force (or if there have been modifications, that the lease is in full force as modified and identifying the modifications); (b) the dates to which rent and other charges have been paid; (c) so far as the person making the certificate knows, Foundation is not in default under any provisions of this Agreement; and (d) such other matters as Foundation may reasonably request.

48. *Notices.* All notices, requests, demands, and other communications under this Agreement shall be in writing and shall be deemed given if personally delivered or mailed, certified mail, return receipt requested; to the following addresses, which may be changed by written notice to each of the Parties and their representatives listed in this paragraph:

If to District, to:           Río Nuevo Multipurpose Facilities District  
  Attention: City of Tucson, City Manager's Office  
  P. O. Box 27210  
  Tucson, AZ 85726-7210

With a copy to: William A. Hicks III  
SNELL & WILMER, LLP  
400 E Van Buren  
Phoenix, AZ 85004-2202

If to City, to: City of Tucson, City Manager's Office  
Attention: Río Nuevo Project Director  
P. O. Box 27210  
Tucson, AZ 85726-7210

With a copy to: City of Tucson, City Clerk's Office  
P. O. Box 27210  
Tucson, AZ 85726-7210

If to Foundation, to: Congress Street Historic Theatres Foundation  
Attention: Doug Biggers, Executive Director  
P.O. Box 1728  
City, Arizona 85702

If to CSI, to: Congress Street Investors, L.L.C.  
405 W. Franklin  
Tucson, Arizona 85701  
Attention: Tom Warne

With a copy to: Brad Miller  
70 West Cushing Street  
Tucson, AZ 85701

49. *Assignment and Subletting.* Foundation shall not sublet all or any portion of the Historic Rialto Theatre without District's prior written consent. Foundation may assign all of its rights, duties and obligations under this Agreement to any entity which acquires all or substantially all of Foundation's assets by reason of a merger, acquisition or other business reorganization, which shall not be deemed a third party assignment, so long as such successor entity continues to manage and operate the Historic Rialto Theatre in a manner consistent with this Agreement. A third party assignment shall require District's and City's consent, and District and City agree not to withhold or delay such consent if to do so would be commercially unreasonable. Consent by District and City to any assignment or subletting shall not constitute a waiver of the necessity of such consent to any subsequent assignment or subletting. If the Historic Rialto Theatre or any part thereof is sublet or occupied by anyone in addition to Foundation, District may, following an uncured default by Foundation, collect rent from the assignee, sublessee or occupant, and apply the net amount collected to the financial obligations of Foundation under this Agreement, but no such assignment, subletting, occupancy or collection shall be deemed a waiver or release of Foundation from the further performance by Foundation of the covenants on the part of Foundation contained in this Agreement. If Foundation enters into a sublease or assignment of

{A0007668.DOC/}

this Agreement, District reserves the right to hold Foundation jointly and severally liable along with the assignee or sublessee under any and all of the terms, covenants, conditions and obligations contained in or derived from this Agreement, including those arising out of any act, occurrence or omission occurring after said assignment. An agreement between Foundation and a performer or performing group using the Historic Rialto Theatre for a show or series of shows shall not be considered an assignment or sublease for purposes of this paragraph.

50. *Bankruptcy.* Any person or entity to which this Agreement is assigned pursuant to the provisions of the Bankruptcy Code, 11 USC sections 101, *et seq.*, shall be deemed without further act to have assumed all of the obligations of Foundation arising under this Agreement on and after the date of such assignment. Any such assignee shall upon demand execute and deliver to District an instrument confirming such assumption. Any monies or other considerations payable or otherwise to be delivered in connection with such assignment shall be paid to District, shall be the exclusive property of District, and shall not constitute property of Foundation or of the estate of Foundation within the meaning of the Bankruptcy Code. Any monies or other considerations constituting District's property under the preceding sentence not paid or delivered to District shall be held in trust for the benefit of District and be promptly paid to District.

51. *Nondiscrimination.* In its employment policies and practices, public accommodations and provision of services, Foundation shall not discriminate on the basis of race, color, religion, ancestry, sex, age, disability, national origin, sexual orientation, gender identity, familial status or marital status. Nothing in this paragraph shall preclude Foundation from complying with applicable minimum age requirements for the viewing of movies and other entertainment.

52. *Successors and Assigns.* This Agreement shall be binding upon and inure to the benefit of the Parties, their respective heirs, personal representatives, successors and assigns.

53. *No Waiver of Strict Performance.* The failure of District or City to insist upon a strict performance of any of the agreements, terms, covenants and conditions of this Agreement shall not be deemed a waiver of any rights or remedies that District or City may have and shall not be deemed a waiver of any subsequent breach or default in any of such agreements, terms, covenants and conditions.

54. *Authority to Execute Agreement.* The individuals executing this Agreement hereby represent that they have full right, power, and authority to execute this Agreement on behalf of their respective Parties.

55. *Entire Agreement.* This Agreement constitutes the entire agreement and understanding of the parties pertaining to the subject matter of the Agreement and supersedes all offers, negotiations, and other agreements of any kind. All prior and contemporaneous agreements, representations and understandings of the Parties, oral or written, are superseded and merged in this Agreement. There are no representations or understandings of any kind not set forth herein.

56. *Governing Law.* This Agreement shall be construed in accordance with the laws of the State of Arizona.

a. *Non-Severability.* The provisions of this Agreement shall not be given effect individually, and to this end, the provisions of this Agreement are not severable. If any

material provision of this Agreement is determined to be illegal, invalid or unenforceable, the Parties (and if necessary any court) shall fashion an equitable remedy.

57. *No Brokers.* The Parties acknowledge that no brokers were involved in this transaction, and no other parties are thus eligible for compensation as a result of this Agreement.

58. *Headings.* The descriptive headings of the sections of this Agreement are inserted for convenience only and shall not control or affect the meaning or construction of any of the Agreement's provisions.

59. *Exhibits.* Any exhibit attached to this Agreement shall be deemed to have been incorporated in this Agreement by this reference with the same force and effect as if it were fully set forth in the body of the Agreement

60. *Further Acts.* Each of the Parties to this Agreement shall promptly and expeditiously execute and deliver all such documents and perform all such acts as reasonably necessary, from time to time, to carry out the matters contemplated by this Agreement.

61. *Recordation.* This Agreement shall be recorded in its entirety in the official records of Pima County, Arizona not later than ten days after its execution by all Parties and after resolutions are adopted by District's Board of Directors and City's Mayor and Council adopting this Agreement.

62. *Amendments.* No change or addition is to be made to this Agreement except by a written amendment executed by all Parties. An amendment shall be recorded in the official records of Pima County, Arizona within ten days after its execution.

63. *Time of Essence.* Time is of the essence of this Agreement.

64. *Force Majeure.* Notwithstanding any other term, condition or provision of this Agreement to the contrary, if any party to this Agreement is precluded from satisfying or fulfilling any duty or obligation imposed upon it due to labor strikes, material shortages, war, civil disturbances, weather conditions, natural disasters, acts of God, or other events beyond the control of such party, the time period provided herein for the performance by such party of such duty or obligation shall be extended for a period equal to the delay occasioned by such events.

65. *Attorneys' Fees.* If any Party brings a civil action against another Party to enforce or terminate this Agreement or to recover damages for the breach of any of the provisions, covenants or terms of this Agreement, the prevailing party shall be entitled to recover, in addition to any relief to which such prevailing party may be entitled, all costs, expenses and reasonable attorneys' fees incurred in connection the civil action.

66. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signature pages from one or more counterparts may be removed from such counterparts and such signature pages all attached to a single instrument so that the signatures of all parties may be physically attached to a single document.

67. *Effective Date and Duration.* This Agreement is effective when it has been executed on behalf of all of the Parties, and shall terminate on the first anniversary of the last day of the Lease Term, unless terminated earlier by (a) District's optional termination and reconveyance of the

{A0007668.DOC/}



Historic Rialto Theatre back to Rialto (see paragraph 12) or (b) District's election after Foundation's default (see paragraphs 33 and 35) or (d) condemnation (see paragraph 38).

68. *Obligations While Agreement is Effective.* Unless otherwise provided, each and every obligation set forth in this Agreement shall apply at all times while this Agreement is in effect (see paragraph 67)

69. *Request for Abatement of base Rent.* At any time after the First Anniversary of the Lease Commencement but before the Tenth Anniversary of the Lease Commencement, Foundation can request from District and City an abatement of the amount of the base rent [see paragraph 8(a)] to the extent that Foundation's investment in the physical restoration of the Theatre has exceeded the restoration requirements articulated in this Agreement, including but not limited to the requirements described in paragraphs 4 and 18. In other words, if the Foundation has invested more in restoration of the Theatre than is otherwise required by this Agreement, Foundation may request that District and City reduce future payments of base Rent [paragraph 8(a)] in an amount equal to Foundation's excess investment in the restoration. The City Manager or Manager's designee shall have the authority to approve the requested abatement of base Rent pursuant to this paragraph. In no case may the Manager or designee approve an abatement of base Rent in an amount greater than the amount expended by Foundation in excess of its obligations under this Agreement.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK.]

“City”  
CITY OF TUCSON

\_\_\_\_\_  
Mayor

ATTEST:

\_\_\_\_\_  
City Clerk Date

This agreement has been submitted to the undersigned attorney for the City of City, who has determined that this agreement is in proper form and is within the powers and authority granted under the laws of the State of Arizona to the City of City.

\_\_\_\_\_  
Assistant City Attorney Date

“Foundation”  
\_\_\_\_\_  
FOUNDATION

\_\_\_\_\_  
\_\_\_\_\_, President/Executive Director

STATE OF ARIZONA } ss.  
County of Pima

SUBSCRIBED AND SWORN TO BEFORE ME this \_\_\_\_ day of November, 2004 by \_\_\_\_\_, President/Executive Director of the \_\_\_\_\_ Foundation, on behalf of the corporation.

My commission expires:  
\_\_\_\_\_

“District”  
RÍO NUEVO MULTIPURPOSE FACILITIES  
DISTRICT

\_\_\_\_\_  
Chairman

ATTEST:

\_\_\_\_\_  
Clerk Date

This agreement has been submitted to the undersigned attorney for the Río Nuevo Multipurpose Facilities District, who has determined that this agreement is in proper form and is within the powers and authority granted under the laws of the State of Arizona to the Board.

\_\_\_\_\_  
Attorney to District Date

“CSI”

CONGRESS STREET INVESTORS, L.L.C.

\_\_\_\_\_, President/Executive Director

STATE OF ARIZONA     }  
County of Pima        }ss.

SUBSCRIBED AND SWORN TO BEFORE ME this \_\_\_\_ day of \_\_\_\_\_, 2004 by \_\_\_\_\_, President/Executive Director of the \_\_\_\_\_ Foundation, on behalf of the corporation.

My commission expires:

\_\_\_\_\_ Notary Public

\_\_\_\_\_  
NOTARY PUBLIC

### EXHIBITS

1. Legal description of the Historic Rialto Theatre (see paragraph 1)
2. Title exceptions (see paragraph 6)

{A0007668.DOC/}

**HISTORIC RIALTO THEATRE RESTORATION AGREEMENT**  
**05/22/04 DRAFT**  
**RÍO NUEVO MULTIPURPOSE FACILITIES DISTRICT**

Congress Street Historic Theatres Foundation			
Schedule of Values			
	Rio Nuevo Funds Allocation	CSHT Foundation Matching Funds	
Acquisition cost for Rialto Theatre real property	\$1,200,000		
Acquisition of Rialto Theatre "going concern"	\$340,000	\$442,800	
Immediate Improvements to Rialto Theatre	\$100,000		
Life Safety and Electrical			
Cosmetic			
Acoustic/Performance			
New Marquee			
Initial Architectural/Engineering/Consulting			
Fundraising match in first 6 months	\$250,000		
COMPLETE RENOVATION OF RIALTO THEATRE			
Structural		\$455,000	
Mechanical/Plumbing		\$385,000	
Electrical		\$205,000	
Equipment		\$205,000	
FF&E		\$500,000	
A&E Fees		\$360,000	
Contractor Fees		\$500,000	
Taxes/Permits		\$167,500	
Contingency		\$294,600	
Restoration and Finishes		\$290,000	
TOTALS			
	<u>\$1,890,000</u>	<u>\$3,804,900</u>	